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James Russell Curtis

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EXAMINER

DAO, THUY CHAN

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/691,028  
Filing Date: October 22, 2003  
Appellant(s): CURTIS ET AL.

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Clifton L. Anderson  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed July 15, 2009 appealing from the Office action mailed April 16, 2009.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

2004/0003266 A1	Moshir et al.	01-2004
6,678,888	Sakanishi	01-2004

### **(9) Grounds of Rejection**

The following grounds of rejection are applicable to the appealed claims:

- ❑ Claims 1, 3-6, and 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Moshir (US Patent No. 2004/0003266 A1) in view of Sakanishi (US Patent No. 6,678,888).

#### **Claim 1:**

Moshir discloses *a method comprising:*

*launching an application on a user system (e.g., FIG. 5, target computer 500, [0118]-[0121]; software and patches installed/launched in said target computer 500, [0086]-[0092]);*

*tracking usage of said application so as to generate usage data on said user system (e.g., [0010]-[0018]; FIG. 6, usage/software/hardware info 604-608, [0099]-[0100]);*

*accessing an update site from said user system (e.g., FIG. 2, update server 220, package computer 230; FIG. 5 and related text);*

*transferring said usage data from said user system to said update site (e.g., FIG. 8, blocks 812-820, [0096]-[0097]; FIG. 7, [0143]-[0146]);*

*said update site prioritizing updates for said application (e.g., [0149]-[0152], [0181]); and*

*said update site presenting to a user a list of said contents as prioritized in said prioritizing step (e.g., FIG. 6, block 706, [0144]-[0147]; FIG. 5, [0129], notification means 516, [0132]; [0091] and [0115], presenting the list via email and IM).*

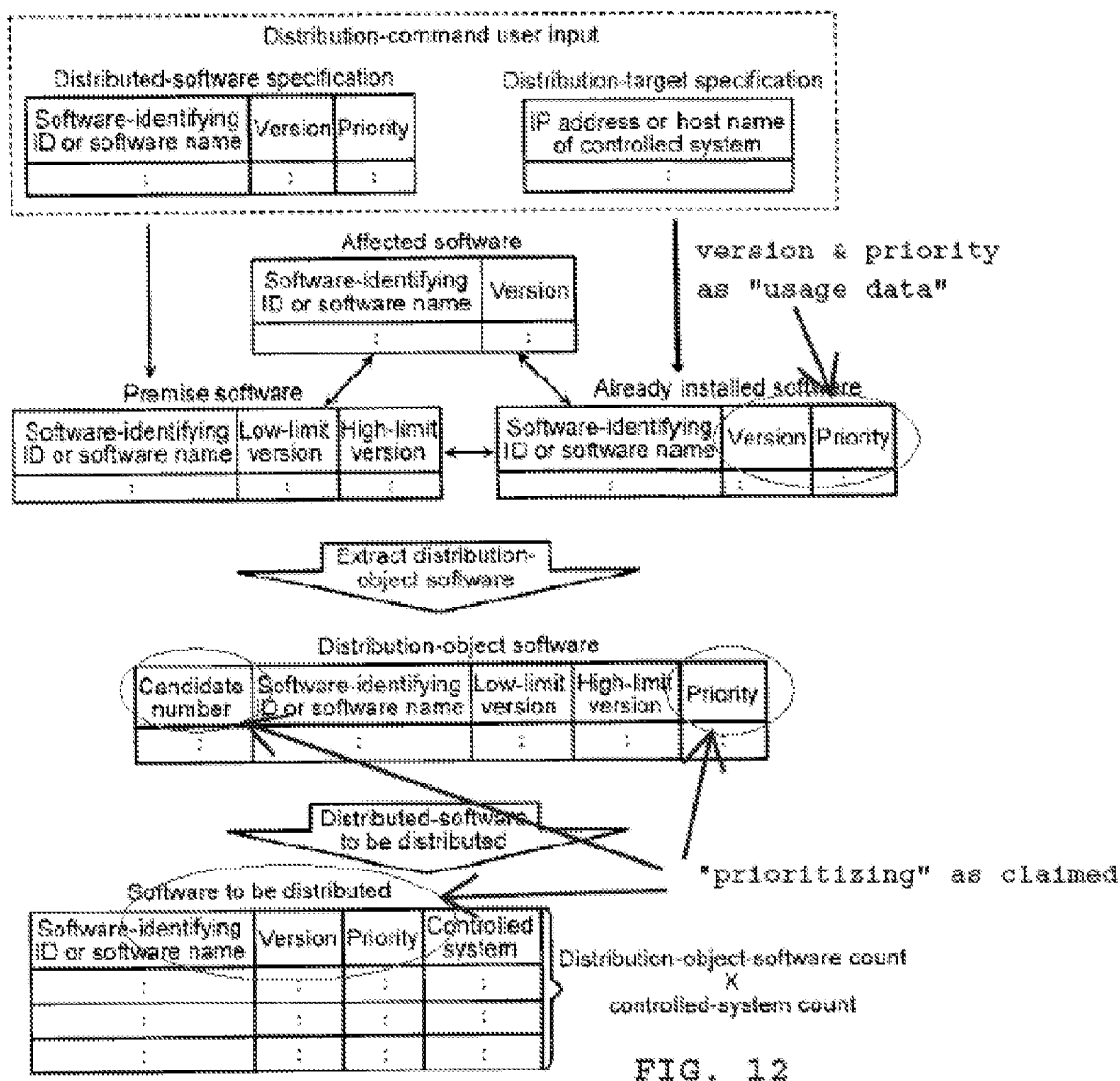
Moshir does not explicitly disclose said update site prioritizing contents for said application at least in part as a function of said usage data.

However, in an analogous art, Sakanishi further discloses:

*usage data (e.g., FIG. 3, col.7: 23-40, software information; FIG. 12, col.9: 56 – col.10: 10, usage data associated with Already installed software and IP address of host name;*

“There is further provided a management means for controlling software usage priorities, which are each set when a distribution is requested, and already Installed software by associating the former with the latter. The usage priority level of software requested to be newly distributed is compared with the usage priority level of already installed software to determine whether the usage condition of the already installed software takes precedence, or the usage condition of the software requested to be newly distributed takes precedence, and to make a decision as to whether to cancel the distribution or to handle the software requested to be newly distributed as an object of distribution.” (col.3: 25-36, “usage priority level of already installed software” (which is gathered on the user computer system) as the claimed limitation “usage data”, emphasis added);

*said update site prioritizing updates for said application at least in part as a function of said usage data (e.g.,*



In FIG. 12, Sakanishi teaches comparing said Affected software with Premise software and Already installed software (Sakanishi' s "version" and "usage priority level" as the claimed limitation "data usage", which is gathered on the user computer system) to generate a list of candidate software with priority levels, e.g.,

col.5: 27-32, "As an alternative, the priority level assigned to software to be distributed is compared with the priority level of already installed software to select software with the higher

priority level and to determine whether or not to distribute the software to be distributed.”;

col.8: 16-28, “As shown in FIG. 6, the entry comprises pieces of information on a software-identifying ID 31, a version 32 and a priority level 33. The priority level 33 is compared with the priority level of software requested for distribution to determine whether or not to distribute the requested software. A control system can have an already-installed-software management table for each controlled system or, in order to reduce the checking-process load, a control system has only an already-installed-software management table common to all controlled systems wherein each entry of this table is associated with controlled systems completing installation of the piece of software represented by the entry.” (emphasis added))

*said update site presenting to a user a list of said contents as prioritized in said prioritizing step (e.g., FIG. 25-26, col.15: 32-64).*

It would have been obvious to a person having ordinary skill in the art at the time the invention was made to combine Sakanishi’s teaching into Moshir’s (prioritizing updates without at least in part as a function of said usage data, emphasis added). One would have been motivated to do so to efficiently handle software distribution per usage data as suggested by Sakanishi (e.g., col.3: 25-37, emphasis added).

### **Claim 3:**

The rejection of claim 1 is incorporated. Moshir also discloses said user selects one or more of said updates for said application (e.g., [0158], [0187], [0189], [0191]).

### **Claim 4:**

The rejection of claim 3 is incorporated. Moshir also discloses *said selected ones of said updates are installed so as to modify said application* (e.g., [0122]-[0127]).

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**Claim 5:**

The rejection of claim 1 is incorporated. Moshir also discloses *further development of said application is directed in part as a function of said usage data (e.g., [0065]-[0070])*.

**Claim 6:**

Moshir discloses *a computer program product comprising computer-readable storage media encoded with a set of computer programs including:*

*a usage data evaluator for receiving and evaluating raw usage data received provided by a user computer system (e.g., [0010]-[0018]; FIG. 6, usage/software/hardware info 604-608, [0099]-[0100]);*

*regarding a version of a software application installed thereon (e.g., FIG. 5, target computer 500, [0118]-[0121]; software and patches installed/launched in said target computer 500, [0086]-[0092]);*

*said usage data evaluator providing evaluated usage data (e.g., FIG. 8, blocks 812-820, [0096]-[0097]; FIG. 7, [0143]-[0146]);*

*an update prioritizer for prioritizing updates available for said version (e.g., [0149]-[0152], [0181]);*

*a web interface for communicating with said user computer system via a browser on said user system as to present to a user of said computer system a list of said contents as prioritized by said prioritizer (e.g., FIG. 5, Notification Means 516 includes Email 518, Instant Message 570 as the claimed limitation "a web interface").*

Moshir does not explicitly disclose an update prioritizer for prioritizing updates available for said version at least in part as a function of said evaluated usage data.

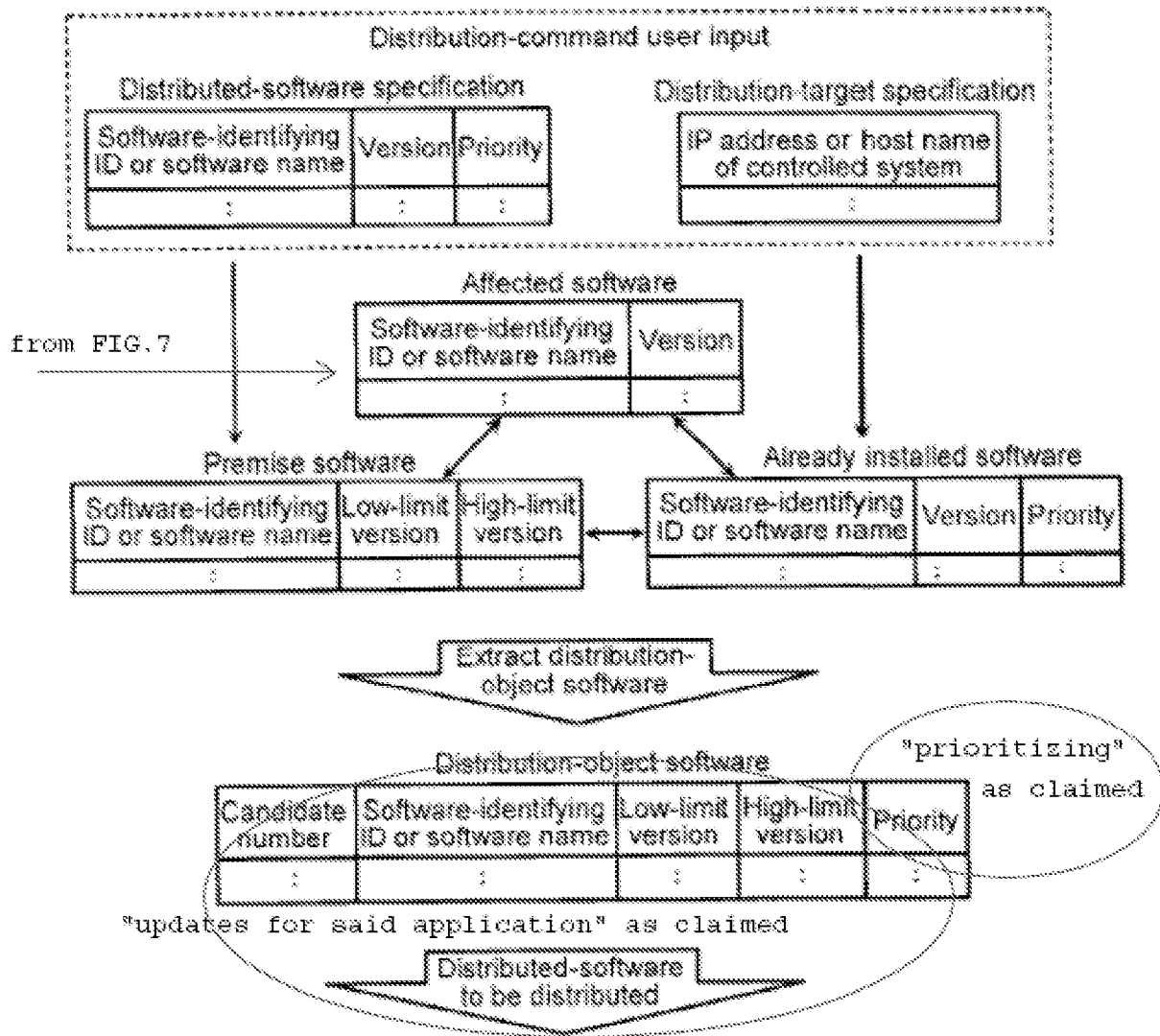
However, in an analogous art, Sakanishi further discloses:

*usage data (e.g., FIG. 3, col.7: 23-40; FIG. 12, col.9: 56 – col.10: 10);*

*an update prioritizer for prioritizing updates available for said version at least in part as a function of said evaluated usage data (e.g., FIG. 7 explicitly teaches Affected software.*



**FIG.12**



In FIG. 12, Sakanishi teaches comparing said Affected software with Premise software and Already installed software to generate a list of candidate software with priority levels, e.g.,

col.5: 27-32, "As an alternative, the priority level assigned to software to be distributed is compared with the priority level of already installed software to select software

with the higher priority level and to determine whether or not to distribute the software to be distributed.”;

col.8: 16-28, “As shown in FIG. 6, the entry comprises pieces of information on a software-identifying ID 31, a version 32 and a priority level 33. The priority level 33 is compared with the priority level of software requested for distribution to determine whether or not to distribute the requested software. A control system can have an already-installed-software management table for each controlled system or, in order to reduce the checking-process load, a control system has only an already-installed-software management table common to all controlled systems wherein each entry of this table is associated with controlled systems completing installation of the piece of software represented by the entry.” (emphasis added)); and

*a web interface for communicating with said user computer system via a browser on said user system as to present to a user of said computer system a list of said contents as prioritized by said prioritizer (e.g., FIG. 25-26, col.15: 32-64).*

It would have been obvious to a person having ordinary skill in the art at the time the invention was made to combine Sakanishi’s teaching into Moshir’s (prioritizing updates without at least in part as a function of said usage data, emphasis added). One would have been motivated to do so to efficiently handle software distribution per usage data as suggested by Sakanishi (e.g., col.3: 25-37, emphasis added).

**Claim 8:**

The rejection of claim 6 is incorporated. Moshir also discloses *said web interface specifies, for at least some of said updates, advantages over said version of said application* (e.g., [0019]-[0026]).

**Claim 9:**

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The rejection of claim 6 is incorporated. Moshir also discloses *a usage-tracking module installed on said user computer system* (e.g., [0129]-[0132]).

**Claim 10:**

The rejection of claim 9 is incorporated. Moshir also discloses *said usage-tracking module is integrated with said version of said application* (e.g., FIG. 4, monitor module, [0078]-[0086]).

**(10) Response to Argument**

**GROUP 1: Claims 1, 3, and 4.** (Brief, pp. 10-14)

**Claim 1:**

a) Limitations at issue “*said update site presenting to a user a list of said updates as prioritized in said prioritizing step*” (Brief, pp. 10-12, emphasis added).

As an initial matter, examiner apologizes for the typo in page 5 of the previous Office action mailed April 16, 2009. The correct phrase should be - -...[[FIG. 6]] FIG. 7, block 706, [0144]-[0147]....- -.

Moshir teaches:

*said update site prioritizing updates for said application (e.g.,*

“The present invention provides tools and techniques for managing and distributing critical patches that resolve known security vulnerabilities and other stability issues or enhancements, etc. in various operating systems ... ([0149], prioritizing patch distribution based on critical/non-critical levels related to security vulnerabilities and/or stability issues)

By contrast, the present invention can provide notification 824 of critical updates to computers in a proactive manner, whether or not they have Internet access... ([0151], i.e., presenting notification of critical/prioritized updates)

One embodiment of the present invention includes content replication through an update server 528 that retrieves the latest critical updates from a master archive such as a package computer 567. Retrieval may use 128-bit SSL or other familiar protocols for secure transmission. As new updates are added to the master archive, the updates' metadata are downloaded automatically to the update servers and/or the fingerprint library 904. If metadata indicates a patch is critical, the patch can be downloaded to the

update server and cached there for rapid deployment. Each patch has an associated installer 912, prerequisite signature 910, and other fingerprint identification 906" ([0152], identifying/prioritizing critical/non-critical patches related to security vulnerabilities and/or stability issues, i.e., "prioritizing updates" as claimed, emphasis added); and

"An automatic caching feature in some embodiments causes the update server 528 to automatically download and cache in its local update server storage patches 554 that are marked as critical, high-priority, and/or security-related. The update server notifies the administrator as to which patches are critical and which are cached ("presenting a prioritized list" as claimed), and scans for target computers 500 that need the patch. By contrast, non-critical patches may be cached at the update server only after they are first deployed ..." ([0181], notifying/prioritizing critical, high-priority patches against non-critical patches, emphasis added); and

*said update site presenting to a user a list of said contents as prioritized in said prioritizing step (e.g.,*

FIG. 7, block 706 "Proposed Update List", "...The update list may include service packs for installed software, previously uninstalled software, updated data files, and the like. The process of preparing the suggested list may take into account not only the current software configuration but also information such as the hardware configuration 608, and how often a particular program, data file, etc. is accessed 604 (see further in FIG. 6, 604, [0142]), as well as other information that is known to one of skill in the art. An administrator may be automatically notified of the update list." ([0144], i.e., presenting the update list to an administrator, emphasis added);

“...This update list may now be used to update the target computers, and/or may be sent to an administrator by a notifier 916” ([0115], that is to say: presenting the update list to the administrator to view, emphasis added);

“If any modifications are made that may be of interest to the administrator, the notifier 916 will send a notification message containing the new patch updates that have become available or the patch-related state changes that have occurred in his network configuration. Notifications can be sent via e-mail, pager, telephony, SNMP broadcast or Instant Message.” ([0091], presenting the list of new patch updates via e-mail and IM, emphasis added).

b) Limitations at issue “*said update site prioritizing updates for said application at least in part as a function of said usage data*” (Brief, pp. 12-13).

Per the plain language of claims, Sakanishi explicitly teaches *usage data* (e.g., FIG. 12, col.9: 56 – col.10: 10, which teaches at least, such a usage data as “Already Installed software”, “Version”, “Priority” being used to derive which candidate software/application are to distributed – See annotated FIG.12 below:

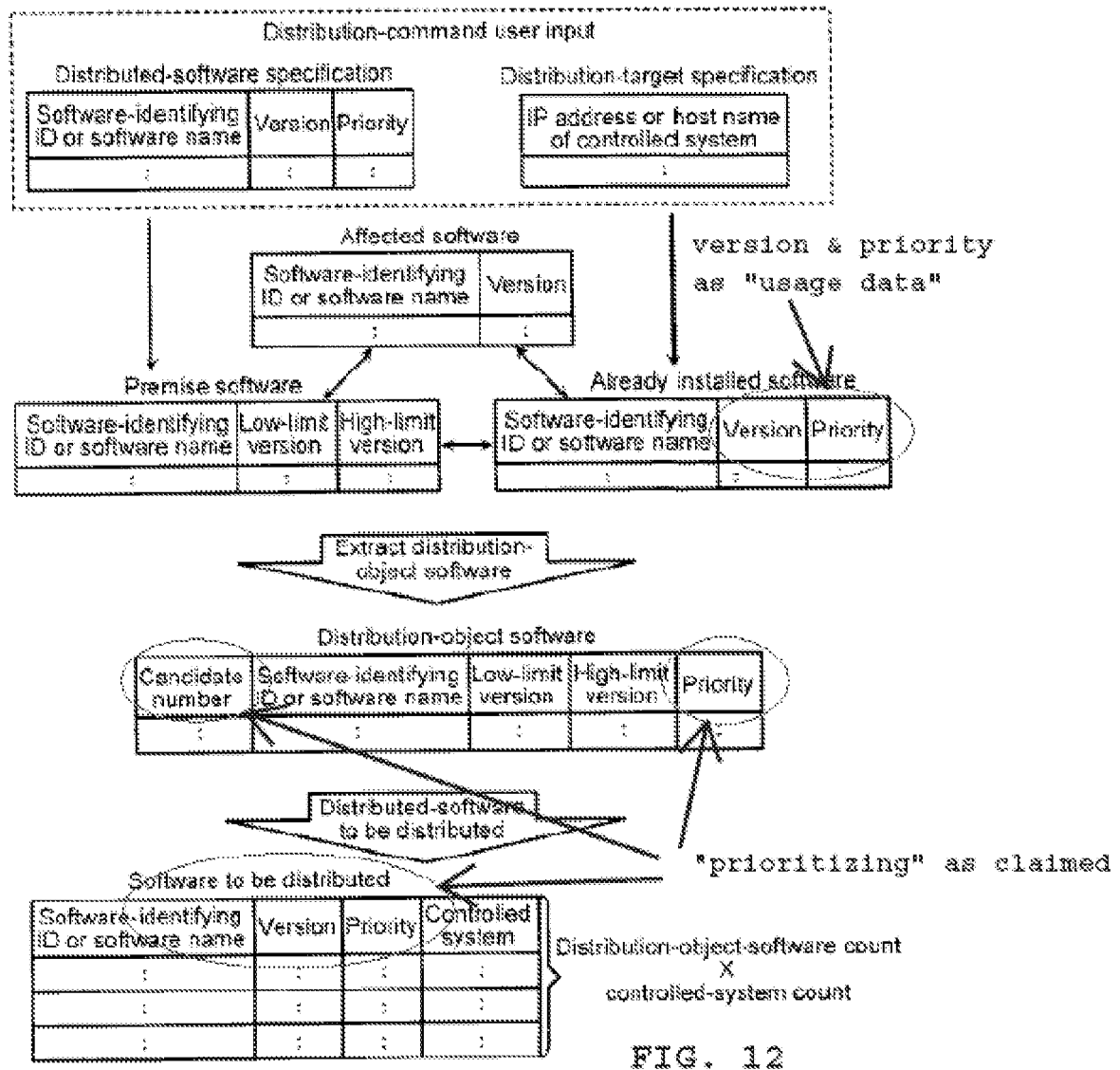


FIG. 12

"There is further provided a management means for controlling software usage priorities, which are each set when a distribution is requested, and already Installed software by associating the former with the latter. The usage priority level of software requested to be newly distributed is compared with the usage priority level of already installed software to determine whether the usage condition of the already installed software takes precedence, or the usage condition of the software requested to be

newly distributed takes precedence, and to make a decision as to whether to cancel the distribution or to handle the software requested to be newly distributed as an object of distribution.” (col.3: 25-36, “usage priority level of already installed software” as the claimed limitation “usage data”; said “usage priority level” is compared to “determine whether”/“to make a decision” as the claimed limitation “at least in part as a function of said usage data”, emphasis added).

Furthermore, examiner notes that the originally filed disclosure defines,

“The present invention provides a system for selecting updates as a function of usage information gathered from a user. Data regarding usage is gathered on the user's computer system. During an update session, the usage data is transmitted to a vendor's computer system. The vendor's computer system analyzes the usage data to provide information to help the user select updates” (page 3, [0010], emphasis added).

Accordingly, “usage data” does not exclude usage data/information such as “version” and/or “usage priority level” of the Already installed software (that is to say, gathered from the user’s computer system).

Sakanishi further discloses *said update site prioritizing updates for said application at least in part as a function of said usage data* (e.g., in FIG. 12, Sakanishi teaches comparing said Affected software with Premise software and Already installed software (Sakanishi’s “version” and “usage priority level” as the claimed limitation “data usage”, which is gathered on the user computer system) to generate a list of candidate software with priority levels, e.g.,

col.5: 27-32, “As an alternative, the priority level assigned to software to be distributed is compared with the priority level of



already installed software to select software with the higher priority level and to determine whether or not to distribute the software to be distributed.”;

col.8: 16-28, “As shown in FIG. 6, the entry comprises pieces of information on a software-identifying ID 31, a version 32 and a priority level 33. The priority level 33 is compared with the priority level of software requested for distribution to determine whether or not to distribute the requested software. A control system can have an already-installed-software management table for each controlled system or, in order to reduce the checking-process load, a control system has only an already-installed-software management table common to all controlled systems wherein each entry of this table is associated with controlled systems completing installation of the piece of software represented by the entry.” (emphasis added)).

c) No Motivation to Combine (Brief, pp. 13-14)

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

In the instant case, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to combine Sakanishi's teaching (prioritizing updates at least in part of “usage priority level”) into Moshir's (prioritizing updates at least in part of critical level). One would have been motivated to do so to

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efficiently handle software distribution (prevent wasteful distribution and/or distributing based on usage condition) as suggested by Sakanishi (e.g., col.3: 6-14, comparing already installed software id/versions and cancel the distribution if duplication occurs; col.3: 25-37, comparing the usage priority levels and cancel the distribution if needed).

d) Proposed Combination does not meet claim limitations (Brief, page 14)

In response to Appellants' concern that whether Moshir's lists to be replaced by Sakanishi's tables (Brief, page 14, [23]), examiner notes that in view of broadest reasonable interpretation, a list does not exclude a particular list in a tabular form (i.e., a table).

Contrast with Appellants' assertions (Brief, page 14, [23]), examiner further notes that Moshir's disclosure does not exclude a user participate in the update process ([0025], selecting date and time to deploy update packages).

As set forth in a) and b) above, the combination of Moshir in view of Sakanishi explicitly and fully meet all the limitations of Claim 1.

**Claims 3 and 4:**

Claims 3 and 4 are also rejected based on virtue of their dependencies on the rejected base claim 1.

**GROUP 2: Claim 5** (Brief, page 15)

The rejection of claim 1 is incorporated. Based on usage data (Sakanishi, FIG. 12, Version and Priority level ("usage data" as claimed) of Already Installed Software), updates/patches of the already installed software can be further be developed/generated based on said particular version and/or priority level (Moshir, [0069]-[0070], "an incremental software patch", "an update to an old program", "an update of the update agent").

**GROUP 3: Claims 6 and 8-10** (Brief, p. 16-22)

**Claim 6:**

a) Limitations at issue “*a usage data evaluator for receiving and evaluating raw usage data received provided by a user computer system*” (Brief, pp. 16-17).

Examiner respectfully disagrees with Appellants’ assertions. Moshir explicitly teaches *a usage data evaluator for receiving and evaluating raw usage data received provided by a user computer system* (e.g., FIG. 6, computer information includes Usage Info 604, Software Info 606, Hardware Info 608, Web Info 610; and

FIG. 8, block 812 “gather information” as the claimed limitation “receiving... raw usage data”; block 820 “compare gathered info” as the claimed limitation “evaluating raw usage data” – See annotated FIG. 8 below:

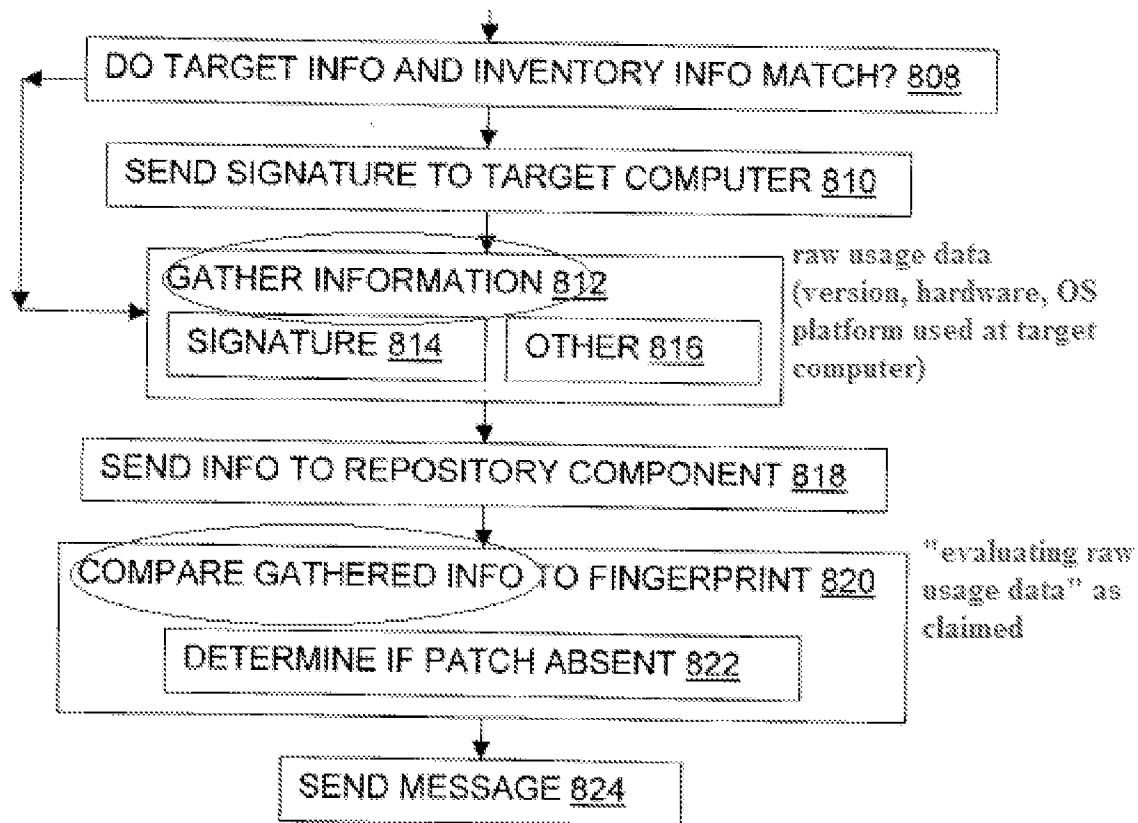


Fig. 8

b) Limitations at issue “*an update prioritizer for prioritizing updates available for said version*” (Brief, pp. 17-18)

Examiner respectfully disagrees with Appellants’ assertions. Moshir explicitly teaches *an update prioritizer for prioritizing updates available for said version* (e.g.,

“The present invention provides tools and techniques for managing and distributing critical patches that resolve known security vulnerabilities and other stability issues or enhancements, etc. in various operating systems ...

By contrast, the present invention can provide notification 824 of critical updates to computers in a proactive manner, whether or not they have Internet access...

One embodiment of the present invention includes content replication through an update server 528 that retrieves the latest critical updates from a master archive such as a package computer 567. Retrieval may use 128-bit SSL or other familiar protocols for secure transmission. As new updates are added to the master archive, the updates' metadata are downloaded automatically to the update servers and/or the fingerprint library 904. If metadata indicates a patch is critical, the patch can be downloaded to the update server and cached there for rapid deployment. Each patch has an associated installer 912, prerequisite signature 910, and other fingerprint identification 906" ([0149]-[0152], identifying/prioritizing critical/non-critical patches related to security vulnerabilities and/or stability issues, i.e., "prioritizing updates" as claimed, emphasis added); and

"An automatic caching feature in some embodiments causes the update server 528 to automatically download and cache in its local update server storage patches 554 that are marked as critical, high-priority, and/or security-related. The update server notifies the administrator as to which patches are critical and which are cached, and scans for target computers 500 that need the patch. By contrast, non-critical patches may be cached at the update server only after they are first deployed ..." ([0181], notifying/prioritizing critical, high-priority patches, emphasis added).

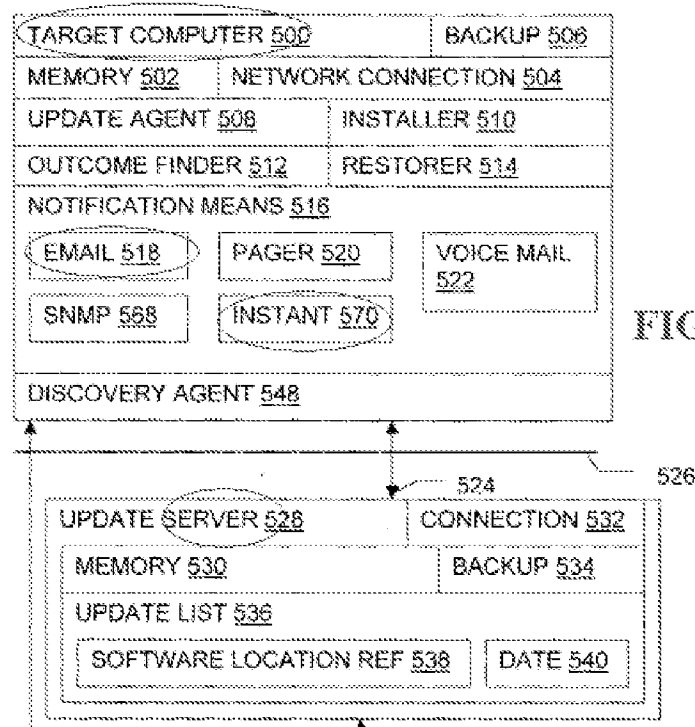
c) Limitations at issue "a web interface for communicating with said user computer system via a browser on said user system as to present to a user of said

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computer system a list of said contents as prioritized by said prioritizer" (Brief, pp. 17-18).

Examiner respectfully disagrees with Appellants' assertions. Moshir explicitly teaches a web interface for communicating with said user computer system via a browser on said user system as to present to a user of said computer system a list of said contents as prioritized by said prioritizer (e.g., FIG. 5, Notification Means 516 includes Email 518, Instant Message 570 as the claimed limitation "a web interface",

"If any modifications are made that may be of interest to the administrator, the notifier 916 will send a notification message containing the new patch updates that have become available or the patch-related state changes that have occurred in his network configuration. Notifications can be sent via e-mail, pager, telephony, SNMP broadcast or Instant Message." ([0117], emphasis added)



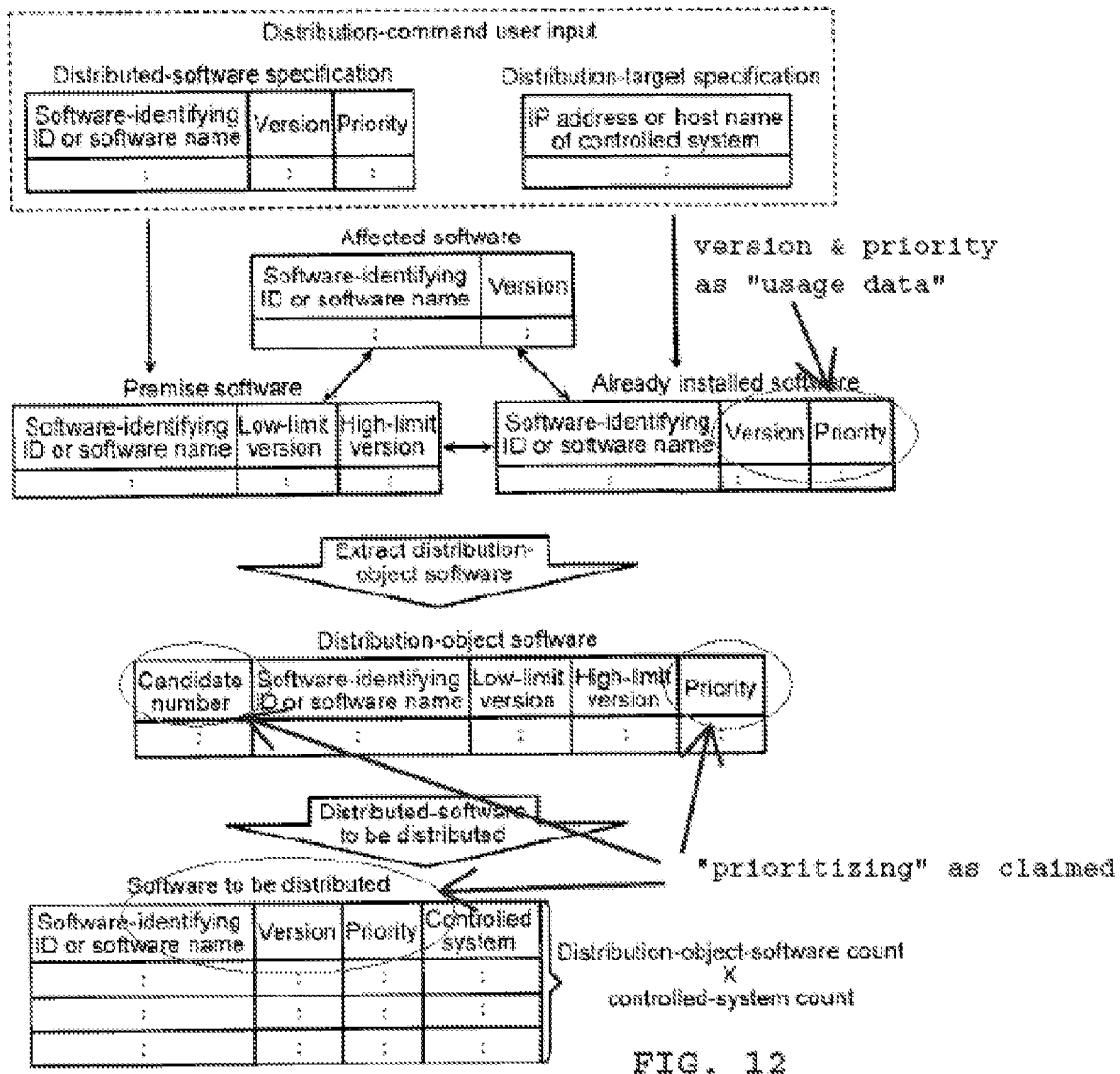
d) Limitations at issue “*an update prioritizer for prioritizing updates available for said version at least in part as a function of said evaluated usage data*” (Brief, pp. 19-)

Examiner respectfully disagrees with Appellants’ arguments. Sakanishi explicitly teaches:

*usage data* (e.g., FIG. 12, col.9: 56 – col.10: 10, usage data associated with Already installed software and IP address of host name;

“There is further provided a management means for controlling software usage priorities, which are each set when a distribution is requested, and already Installed software by associating the former with the latter. The usage priority level of software requested to be newly distributed is compared with the usage priority level of already installed software to determine whether the usage condition of the already installed software takes precedence, or the usage condition of the software requested to be newly distributed takes precedence, and to make a decision as to whether to cancel the distribution or to handle the software requested to be newly distributed as an object of distribution.” (col.3: 25-36, emphasis added);

said update site prioritizing updates for said application at least in part as a function of said usage data (e.g., see annotated FIG. 12 below



In FIG. 12, Sakanishi teaches comparing said Affected software with Premise software and Already installed software to generate a list of candidate software with priority levels (prioritizing), e.g.,

col.5: 27-32, "As an alternative, the priority level assigned to software to be distributed is compared with the priority level of already installed software (usage data) to select software with the



higher priority level and to determine whether or not to distribute the software to be distributed.”;

col.8: 16-28, “As shown in FIG. 6, the entry comprises pieces of information on a software-identifying ID 31, a version 32 and a priority level 33. The priority level 33 is compared with the priority level of software requested for distribution to determine whether or not to distribute the requested software. A control system can have an already-installed-software management table for each controlled system or, in order to reduce the checking-process load, a control system has only an already-installed-software management table common to all controlled systems wherein each entry of this table is associated with controlled systems completing installation of the piece of software represented by the entry.” (emphasis added)).

e) Lack of Motivation (Brief, page 21)

In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to combine Sakanishi's teaching into Moshir's (prioritizing updates, but without at least in part as a function of said usage data - emphasis added).

One would have been motivated to do so to efficiently handle software distribution at least in part per usage data/priority levels to prevent any wasteful distribution, maintain the condition for using software being used remains satisfied,

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and/or determine whether which usage condition takes precedence and distribute or cancel software distribution as suggested by Sakanishi (e.g., col.3: 6-37, emphasis added).

f) Failure of Proposed Combination to meet claim limitations (Brief, page 21)

As set forth in a) and b) above, the combination of Moshir in view of Sakanishi explicitly and fully meet all the limitations of Claim 6.

**Claims 8-10** (Brief, page 22):

Claims 8-10 are also rejected based on virtue of their dependencies on the rejected base claim 6.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

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For the above reasons, it is believed that the rejection should be sustained.

Respectfully submitted,

/Twee Dao/

Examiner, Art Unit 2192

Conferees:

/Tuan Q. Dam/

Tuan Q. Dam

Supervisory Patent Examiner, Art Unit 2192

/Lewis A. Bullock, Jr./

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